In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 657

CARNATION COMPANY, PETITIONER

v.

PACIFIC WESTBOUND CONFERENCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL MARITIME COMMISSION

STATEMENT

Petitioner, Carnation Company, brought an anti-trust action for treble damages against two shipping conferences, Pacific Westbound Conference (Pacific) and Far East Conference (Far East), and their members, individual shipping lines.[1] The complaint (Pet. App. 53),[2] alleged that the conferences and their members engaged in an unlawful combination to fix rates at which products would be transported from Pacific coast ports in the United States to the

[1] The chairmen of the two conferences were also named as defendants; the chairman of the Far East Conference was not served and did not appear.

[2] "Pet. App." refers to the appendix to the petition.

Far East, and that as a result, Carnation had been obliged to pay for the transportation of its products at rates unlawfully determined.

Pacific and Far East are conferences of shipping lines engaged in trade between the United States and the Far East. They are established pursuant to agreements under section 15 of the Shipping Act, 39 Stat. 733, as amended, 46 U.S.C. 814,[3] which requires rate-fixing agreements among common carriers by water to be filed with the Federal Maritime Commission and exempts approved agreements from the operation of the antitrust laws. The members of both conferences have entered into a further agreement (designated No. 8200), approved by the Commission, providing for joint action with respect to freight rates; this agreement, however, preserves the right of each conference to take independent action after giving notice to the other (Pet. App. 69).

Carnation's complaint alleged that the joint agreement was supplemented by a secret understanding, which was not submitted to the Commission, whereby Pacific surrendered its right to act independently except with respect to certain commodities. According to the complaint, rates for the transportation of Carnation's product by members of Pacific were increased, purportedly as an independent action of Pacific but in fact according to the secret agreement; in November 1957, Carnation asked Pacific to reduce the rates, and Pacific was willing to do so but refused because of Far East's objection. Carnation alleged

[3] The provisions of section 15 are set forth at Pet. App. 41.

that it did not learn about the secret agreement until May 1961. It claimed treble damages for the period from May 1957 to May 1962 when, it was alleged, the rates were lowered to their former level.

Carnation filed its complaint in December 1962. Much earlier, in October 1959, the Federal Maritime Board (predecessor of the Maritime Commission) had instituted proceedings to determine whether No. 8200 was "a true and complete agreement of the parties within the meaning of said Sec. 15, and whether it is being carried out in a manner which makes it unjustly discriminatory or unfair * * *" (Pet. App. 7). Carnation intervened in the administrative proceeding. The initial decision of the hearing examiner was filed in August 1963.

The district court granted the motion of the Maritime Commission (which had intervened in the antitrust suit) and the defendants to dismiss the complaint. (Pet. App. 3.) The court of appeals affirmed without deciding "whether there might ultimately arise out of the situation here presented a right to relief under the antitrust laws" (Pet. App. 34) (footnote omitted).[4] It held that under established principles primary jurisdiction to determine the issues presented was vested in the Maritime Commission. In concluding that the case should be dismissed rather than retained on the district court's docket, the court of appeals stated:

> The only possible reason for allowing the action to be retained on the district court docket

[4] The opinion of the court of appeals is reported at 336 F. 2d 650.

would be to avoid a claim that antitrust action was barred by the statute of limitations. Since we hold that such an action cannot at this date be maintained, this reason is not applicable here. [Pet. App. 34, n. 32.]

DISCUSSION

The questions involved in this case are whether the alleged secret agreement between Pacific and Far East "was made in fact; whether, if made, it was contrary to Agreement No. 8200; and finally, whether it would be required to be filed with and approved by the Commission" (Pet. App. 31). As the court below recognized, all of these questions call for the administrative experience and special knowledge of the Commission, the "administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade," *United States Navigation Co., Inc.* v. *Cunard Steamship Co., Ltd.*, 284 U.S. 474, 485. Accordingly, they should be determined by the Commission in the first instance. *United States Navigation Co., supra; Far East Conference* v. *United States*, 342 U.S. 570; *Federal Maritime Board* v. *Isbrandtsen Co., Inc.*, 356 U.S. 481, 498–499. The principles of primary jurisdiction are particularly applicable in this case, since, long before the complaint was filed, the Commission had undertaken an investigation involving the very questions at issue here and presently has those questions under consideration.[5]

[5] Even if one were to assume that the Commission will decide all of the questions adversely to the conferences and the shipping

It would, therefore, be premature for this Court to decide the substantive issue, not passed upon below, of whether petitioner ultimately will have a remedy under the antitrust laws. The Commission's rulings in the proceeding pending before it may render that issue moot and will, in any event, "prepare the way, if the litigation should take its ultimate course, for a more informed and precise determination * * * of the scope and meaning of the statute as applied * * *" (*Isbrandtsen, supra,* at 498–499), to this case.

The remaining issue is what disposition of the case should have been made in the district court. Under section 4B of the Clayton Act, 69 Stat. 283, 15 U.S.C. 15b, an action for treble damages under the antitrust laws must be commenced within four years after the cause of action accrues.

While the law is not entirely settled, May 1961, when petitioner found out about the alleged secret agreement according to the complaint, appears to be the latest date from which the statute of limitations would run on any antitrust claims that petitioner may have. See, *e.g., Allis-Chalmers Mfg. Co.* v. *Commonwealth Edison Co.,* 315 F. 2d 558. Since the proceedings before the Commission may not be finally terminated before May 1965, there is a possibility, under the disposition below, that antitrust claims of petitioner might ultimately be deemed barred by the statute

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lines, the doctrine of primary jurisdiction would be applicable. Compare *Far East Conference, supra,* with *Isbrandtsen, supra.* Of course, no such assumption is warranted at this stage of the proceedings before the Commission.

of limitations.[6] In order to preclude this result of allowing the Commission to exercise primary jurisdiction, the case, we believe, should have been retained on the docket of the district court pending the termination of the administrative proceeding. See *Far East Conference, supra,* at pp. 576–577; *Isbrandtsen, supra,* at 498–499; *General American Tank Car Corp.* v. *El Dorado Terminal Co.,* 308 U.S. 422, 433.[7]

If the Court agrees with our views on the issues which relate to the primary jurisdiction of the Commission, we suggest that the question of adopting the protective measure to which we have referred is not one which would require a plenary hearing.

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[6] There is no statutory provision which suspends the running of the statute of limitations while the case is pending before the Maritime Commission.

[7] In *Far East Conference, supra,* the Court observed that it could either order the case retained on the district court docket pending the conclusion of administrative proceedings or could order the case dismissed. It took the latter course, saying: "We believe that no purpose will here be served to hold the present action in abeyance in the District Court while the proceeding before the Board and subsequent judicial review or enforcement of its order are being pursued. A similar suit is easily initiated later, if appropriate." 342 U.S. at 577. That case involved a government suit for an injunction, and no limitations problem was involved.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should grant the writ of certiorari, vacate the judgment below and remand with directions to retain the case on the docket of the district court pending the termination of the administrative proceeding.

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